

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Patricia Anderson,

Complainant,
vs.

DISMISSAL
ORDER

Rebecca Otto, and
Rebecca Otto for Auditor,

Respondents.

This matter came on for a probable cause hearing under Minnesota Statutes § 211B.34, before Administrative Law Judge Beverly Jones Heydinger on October 4, 2010, to consider a complaint filed by Patricia Anderson on September 23, 2010. The probable cause hearing was conducted at the Office of Administrative Hearings, 600 North Robert Street, Saint Paul, MN. The record closed on October 4, 2010.

Edward T. Matthews, Attorney at Law, appeared on behalf of Complainant Patricia Anderson (Anderson).

David L. Lillehaug, and Christopher A. Stafford, Attorneys at Law, Fredrikson & Byron, P.A., appeared on behalf of Respondents Rebecca Otto (Otto) and Rebecca Otto for Auditor.

Based on the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is not probable cause to believe that the Respondents violated Minn. Stat. § 211B.06.

ORDER

IT IS ORDERED: That there is not probable cause to believe that Respondents violated Minnesota Statute § 211B.06 as alleged in the Complaint, and this matter is accordingly DISMISSED.

Dated: October 7, 2010

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

Digitally recorded; no transcript prepared

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 211B.34, subd. 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Complainant Patricia Anderson, a former state auditor, is a candidate for state auditor in the general election in November 2010. Respondent Rebecca Otto is the current state auditor who seeks reelection. Anderson alleges that Otto and her campaign committee, Otto for Auditor, made false statements in her campaign material and on her website regarding Anderson's tenure as auditor.

Statements at Issue

Anderson alleges that Otto falsely stated that Otto is "more productive" than Anderson was while she was State Auditor, Anderson "only performed ten investigations/letters of review" during her tenure, and that Otto performed three times more investigations/letters of review than Anderson. Anderson alleges that Otto made these false statements in her campaign literature, on her website, in five news articles and during one debate.

In Otto's campaign literature entitled "State Auditor Times," which is designed to appear like a newspaper, one of the headlines states: "Otto conducts 3 times as many investigations as predecessor." Under the headline it states: "New results show that State Auditor Rebecca Otto has been nearly three times more productive as her predecessor, former State Auditor Pat Anderson." Three paragraphs later it states: "A review of the Office of the State Auditor's Web page listing Special Investigations and letters of review bears this out. The years 2003-2006, when Anderson was State Auditor, lists a total of ten

investigations.” The piece is continued on page four of the campaign flyer under the heading “Otto more productive.” It continues “The years 2007-2010, Rebecca Otto’s first term, shows nearly thirty – and Otto says there will be more.”¹ The piece is pictured below.

Otto conducts 3 times as many investigations as predecessor

SAINT PAUL - New results show that State Auditor Rebecca Otto has been nearly three times as productive as her predecessor, former State Auditor Pat Anderson.

Anderson, who is challenging Otto in a 2010 rematch, had claimed that Otto had been “passive and ineffective.”

But due to efficiencies she has built into the office, Otto has been able to conduct nearly three times as many investigations as Anderson did during her entire term.

“Pat just hasn’t been paying attention,” said Otto. “I’ve done nearly three times as many investigations as she has – and people have been sentenced to time.”

A review of the Office of the State Auditor’s Web page listing Special Investigations and letters of review

OTTO MORE PRODUCTIVE, A4

Otto more productive than Pat Anderson

(continued from A1)

bears this out. The years 2003-2006, when Anderson was State Auditor, lists a total of ten investigations.

The years 2007-2010, Rebecca Otto’s first term, shows nearly thirty – and Otto says there will be more.

“This is because of my focus on innovation and efficiency,” Otto said.

“Pat Anderson slashed the office budget then focused on partisan grandstanding. She was inefficient, she made a lot of errors, and she didn’t get very much done as a result.

“I put my nose to the grindstone, and we built in efficiencies and better processes that have saved staff time so they can focus on the important work. In tight economic times and tighter budgets, the taxpayers have gotten far more productivity out of the Office.”

Similarly, on her campaign website Otto wrote that she:

has conducted nearly three times as many investigations as her opponent, former State Auditor Pat Anderson....A review of the Office of the State Auditor’s Web site shows that during the years 2003-2006, when Anderson was State Auditor, there were a total of ten investigations. The years 2007-2010, Rebecca Otto’s first term, shows more than thirty. Pat Anderson says that Rebecca Otto had State Auditor staff remove “hundreds” of investigations. But a review of the Internet Archive for Pat Anderson’s term shows this is false.²

According to Anderson, Otto has also made these statements, or similar statements, during the Coalition of Greater Minnesota Cities Debate, and in news articles that appeared in the Brainerd Dispatch, the Pilot-Independent, the Albert Lea Tribune, the Hutchinson Leader, and the New Ulm Journal.³ Because Otto reproduced the news articles and a clip of the debate on her campaign website, Anderson alleges the news articles and debate constitute campaign material.

¹ See Complaint, Attachment B; see also Probable Cause Ex. 18.

² See Complaint, Attachment B; see also Probable Cause Ex. 3

³ See Complaint, Attachment B.

Anderson alleges the statements are false because Anderson performed more than ten investigations during her tenure and because Otto has not performed three times the number of investigations. Anderson alleges that Otto made these statements knowing they were false, or in reckless disregard as to whether they were false, in violation of Minn. Stat. § 211B.06.

Anderson included several attachments to her complaint, including newspaper articles purportedly documenting 29 investigations/letters of review she conducted while she was state auditor (Attachment A); 8 pieces of “campaign material” in which Otto has made these allegedly false statements (Attachment B, including video clip); documentation of three instances in which Anderson and others questioned Otto regarding the truth of these statements (Attachment C); and documentation that Otto removed the press releases that were issued by Anderson during her tenure as auditor from the State Auditor website (Attachment D).

Legal Analysis

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.⁴ The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.⁵ One must determine whether, given the facts disclosed in the record, it is fair and reasonable to require the respondent to go to hearing on the merits.⁶ A statement of fact must be “capable of being proved true or false.”⁷

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation, dissemination, or broadcast of campaign material with respect to the personal or political character or acts of a candidate that is designed to promote or defeat the candidate, that is false and which the person knows is false or communicates to others with reckless disregard of whether it is false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.⁸

Based upon this standard, at the probable cause stage of the proceeding, the Complainant has the burden to present evidence, sufficient to withstand a motion to dismiss, that the statements were false and that the Respondent either

⁴ Minn. Stat. § 211B.34, subd. 2; *Posusta V. Wojchowski*, OAH Docket No. 3-6385-17601-CV (Nov. 6, 2006).

⁵ 239 N.W.2d 892 (Minn. 1976); see also Black’s Law Dictionary 1219 (7th ed. 1999) (defining “probable cause” as “[a] reasonable ground to suspect that a person has committed or is committing a crime.”)

⁶ *State v. Florence*, 239 N.W.2d at 902.

⁷ *Trepanier v. Audette*, OAH No. 3-6326-16253-CV (October 29, 2004).

⁸ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

published the statements knowing the statements were false, or that she “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.⁹ In addition, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.¹⁰

To be found to have violated section 211B.06, therefore, there must be evidence that two requirements are met: (1) a person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person preparing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent unfavorable deductions or inferences based on fact.¹¹

The Statements Are Not False

Otto’s Statement That She Is “More Productive”

Otto’s statements are not false under Minn. Stat. § 211B.06. First, Otto’s statement that she is “more productive” is not a statement of fact that is capable of being proved true or false. The “productivity” of an elected official cannot be easily measured. The statement that one official is more productive than another cannot be proven or disproven; it is a subjective judgment or matter of opinion. Only statements of fact fall within the scope of § 211B.06, not criticism of the candidate or unfavorable deductions derived from a candidate’s conduct.¹² Otto’s statement that she is “more productive” does not violate § 211B.06.¹³

Even if the productivity of an elected official could be measured in the manner suggested, Anderson failed to show that Otto had evidence that it was false, or that she acted with reckless disregard of its truth or falsity. Rather, Anderson speculated that a review of the Auditor’s records would prove the truth or falsity of the statement and requested that this tribunal order access to the records. The Complainant is free to seek public data, but the possibility of finding

⁹ See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

¹⁰ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

¹¹ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

¹² *Kennedy*, 304 N.W.2d at 300; *Melendez v. Minnesotans for Employee Freedom*, OAH No. 11-0320-19823-CV, Order, (Aug. 18, 2008).

¹³ See *Lindsay v. Minnesota DFL State Committee*, OAH Docket No. 16-0320-20028-CV, Order Nov. 14, 2008 (dismissing § 211B.06 allegation because statement regarding candidate’s priorities and agenda could not be proven true or false).

evidence is not a sufficient basis upon which to determine that there is probable cause to believe a violation occurred.

Otto's Statement That Anderson Conducted "Ten Investigations"

Next Anderson alleges that Otto's statement that Anderson conducted ten investigations during her tenure is false because she conducted more than that number. The statement is not false for two reasons.

First, the statement is not false because the word "investigation" is a general term capable of more than one meaning. Attached to her Complaint as Exhibit A, Anderson submitted documentation of 29 investigations, annual audits, requests for information, media inquiries, and reports that she conducted while she was State Auditor. Anderson claims that the audits, requests for information, media inquiries, and reports documented in Attachment A constitute "investigations."

Black's Law Dictionary defines "investigation" as "[t]he process of inquiring into or tracking down through inquiry," and Merriam-Webster Dictionary defines "investigation" to mean "to make systematic examination; especially to conduct an official inquiry." According to Otto, the word "investigation" as used in connection with the Office of the State Auditor is not a statutorily-defined word or term of art.¹⁴ In her Affidavit submitted at the probable cause hearing, Otto stated that she did not consider the items in Attachment A to be investigative in nature. Anderson has offered no evidence that the term "investigation" is a term of art. Rather, she concedes that the term is open to interpretation. Because there is no official definition of "investigation" as it is used in the context of the State Auditor's Office, Otto and Anderson can reasonably disagree over its definition. Otto is not bound by Anderson's interpretation of the term "investigation," and Anderson's differing interpretation does not make Otto's statement false. Thus, Anderson failed to present sufficient evidence that Otto's statement that Anderson conducted only ten investigations is false within the meaning of § 211B.06.

Anderson conceded that she did not have the information she needed to compare the total number of matters that she handled while in office to the number Otto has handled. At the time of the probable cause hearing, she requested a subpoena for the State Auditor's records in order to complete an investigation. Since the records she seeks are apparently public, she may pursue access to them; however, she can not rely upon speculation about their possible contents to support her claim.

¹⁴ Affidavit of Rebecca Otto, Oct. 4, 2010, at paragraph 2

Secondly, Otto's statements in her campaign flyer and on her website that Anderson conducted ten investigations is not false because the statements make clear that Otto drew her conclusions from the information obtained from the State Auditor's web page listing Special Investigations and letters of review. According to that website, Otto's statement is true. The site shows that there were ten investigations conducted by the State Auditor during Anderson's tenure and that more than thirty were conducted during Otto's term.¹⁵ With the State Auditor website as the source, Otto's statements that "a review of the website shows" that Anderson conducted ten investigations and that Otto has conducted more than three times that number are not false statements of fact under § 211B.06.

Complainant argues that the website is not accurate, and that Otto, as State Auditor, has control over the content posted on the website and has removed the investigations conducted during Anderson's tenure. Otto denies that she directed that the items be removed.¹⁶ The accuracy of the State Auditor's website is beyond the scope of this proceeding. The official State Auditor site, which is not Otto's personal campaign website, is not campaign material, and its accuracy does not fall within the purview § 211B or the jurisdiction of this Office.

There is no requirement that campaign material be thorough or complete. Minnesota's appellate courts have repeatedly held that the statute is not broad enough to prohibit incomplete and unfair campaign statements, even those that are clearly misleading.¹⁷ While Otto's statements may be unfair, incomplete and one-sided, Anderson has failed to offer sufficient evidence that Otto violated § 211B.06. Anderson alleges the statements were first made in March 2010, approximately nine months before the general election that will occur in November. If the statements are unfair, incomplete, or misleading, Anderson has the opportunity to publicly contest Otto's statements and account for her time and productivity as State Auditor.

News Articles Are Not Campaign Material

Even if the statements were false, Otto's statements appearing in news articles would not violate § 211B.06 because news articles are not campaign material. Minn. Stat. § 211B.01 defines "campaign material" as "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media." News items are explicitly excluded from the definition of campaign material.

¹⁵ See Probable Cause Ex. 6.

¹⁶ Affidavit of Rebecca Otto, Oct. 4, 2010, at paragraph 22.

¹⁷ See, *Bundlie*, 276 N.W.2d at 71 (statements telling only one side of the story, while unfair and unjust, were not untrue and therefore not actionable under predecessor statute).

Anderson argues that the news articles in which Otto made the statements should be considered campaign material because Otto reproduced the news articles on her website. The Administrative Law Judge disagrees. A determination whether the statements were factually false would require scrutiny of editorial content, which is clearly not contemplated under § 211B.06. Just because the items were posted on Otto's website does not make the articles subject to judicial review.¹⁸ Similarly, oral statements made by Otto at a debate or campaign forum or in any similar public setting are not within the scope of § 211B.06¹⁹.

Actual Malice

Even if the statements were false, Anderson has not alleged specific facts to show that they were made with actual malice. A complainant must allege facts to show that the respondent entertained serious doubt as to the truth of the publication or acted with a high degree of awareness of its probable falsity.²⁰ This standard "requires that a defendant make a statement while subjectively believing that the statement is probably false" and entertaining serious doubts as to its truth.²¹

Anderson alleged in the Complaint that she told Otto on three different occasions that her statements were false, and the Attachments to the Complaint show that Anderson publicly disputed the accuracy of Otto's statements. One of the attachments is a news article from the Brainerd Dispatch on July 27, 2010, entitled "Otto: Challenges Remain for Auditor." The article states: "Otto said she also conducted three times more investigations than Anderson did in her term." Later, the article states "In a telephone interview, Anderson refuted Otto's accusations, calling them dishonest and disingenuous....Anderson said for Otto to say she conducted three times more investigations than her is false. 'That is not true and I'm not sure where she came up with that,' said Anderson." The other two attachments show similar public challenges to Otto's statement.

Though Anderson publicly challenged Otto's numbers and conclusions, she did not allege specific facts to show that Otto knew the statements were false, or acted with a degree of awareness of its probable falsity. At the probable cause hearing, Anderson argued that Otto knew the statements were false because Otto knew that Anderson had conducted more than ten investigations,

¹⁸ See *Sween v. Tim Kelly, et al.*, OAH Docket No. 3-0320-19985-CV, Order Oct. 28, 2008 (analyzing media exemption under the Federal Election Campaign Act and recognizing the "unique role of the press in informing and educating the public, offering criticism, and providing a forum for discussion and debate"), citing, *inter alia*, *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1314 (D.D.C. 1981).

¹⁹ *Stegner v. Smith*, 2008 WL 2967011 at *4 (Minn. App.) (concluding that oral statements do not constitute "campaign material" within the meaning of § 211B.01).

²⁰ *Melendez v. Minnesotans for Employee Freedom*, OAH Docket No. 11-0320-19823-CV, Order, (Aug. 18, 2008).

²¹ *Chafoulias v. Peterson*, 668 N.W.2d 642, 654-55 (Minn. 2003).

as evidenced by the items in Attachment A. As discussed, Otto does not believe the reports and audits in Attachment A constitute “investigations,” and she is entitled to her opinion. Anderson has not alleged specific facts to show that Otto acted with actual malice.

Respondents’ Additional Defenses

The Respondents have argued that the comments made by Otto are not related to the personal or political character or acts of the candidate but rather to her official duties, and do not fall within the scope of § 211B.06. Respondents have not cited any authority for argument. Although it is not necessary to address this question since the evidence is insufficient to show that the claims are false, the argument is not persuasive. An elected official’s duties are not exempt from § 211B.06.²²

The Respondents have also argued that it would be unconstitutional to apply sanctions to statements that are false but do not fall within certain narrow exceptions, citing *United States v. Alvarez*.²³ Since the Complainant has failed to produce sufficient evidence that Otto’s statements are false, it is not necessary to consider this claim; however, it is important to note that Section 211B.06 is much more narrowly tailored than the statute addressed in *Alvarez*. Section 211B.06 pertains to statements made in campaign material, which narrows the scope of the speech that is regulated, and it requires a showing of malice.

The Complaint is dismissed. Since no hearing will be held, the subpoenas requested by the Complainant will not be issued.

B. J. H.

²² See *Kennedy*, 304 N.W.2d 299 (literature at issue pertained to respondent’s votes for legislative bills); *Anderson v. Faust, et al.*, OAH Docket No. 3-0320-19995-CV (same); *Jackson v. Downey*, OAH Docket No. 15-0320-19992-CV (same); cf. *Sheehan v. Al Franken*, 11-0320-20021-CV, Order Nov. 13, 2008 (dismissing allegation regarding characterization of political group because it did not relate to the personal or political character or acts of Senator Norm Coleman).

²³ ___ F.3d ___, 2010 WL 32333192 (9th Cir., Aug. 17, 2010).



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October 7, 2010

Edward T. Matthews General Counsel Pat Anderson for Auditor 5 Apple Orchard Court Dellwood, MN 55110	David L. Lillehaug Christopher A. Stafford Attorneys at Law 200 South Sixth Street, Suite 4000 Minneapolis, MN 55402
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Re: *In the Matter of Patricia Anderson vs Rebecca Otto and
through (Rebecca) Otto for Auditor; OAH Docket No. 15-0320-
21579-CV*

Dear Counsel:

Enclosed herewith and served upon you by mail is the Administrative Law
Judge's Dismissal Order in the above-entitled matter.

Sincerely,

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

Telephone: (651) 361-7838

BJH:nh

Encl.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
600 NORTH ROBERT STREET
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CERTIFICATE OF SERVICE

Case Title: <i>In the Matter of Patricia Anderson vs Rebecca Otto and through (Rebecca) Otto for Auditor</i>	OAH Docket No. 15-0320-21579-CV
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Nancy J. Hansen certifies that on the 7th day of October, 2010, she served a true and correct copy of the attached Dismissal Order by serving it by email and U S Mail with postage prepaid, addressed to the following individuals:

Edward T. Matthews General Counsel Pat Anderson for Auditor 5 Apple Orchard Court Dellwood, MN 55110	David L. Lillehaug Christopher A. Stafford Attorneys at Law 200 South Sixth Street, Suite 4000 Minneapolis, MN 55402
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